Editor's note: 83 I.D. 666

GENERAL CRUDE OIL COMPANY

IBLA 75-264; IBLA 75-293; IBLA 75-304 Decided December 10, 1976

Appeal from decisions of the Colorado State Office, Bureau of Land Management, requiring that special stipulations be executed as a condition precedent to the issuance of 27 oil and gas leases (C-21484, etc.).

Affirmed as modified, and remanded.

1. Oil and Gas Leases: Stipulations

> Applicants for oil and gas leases may be required to accept a stipulation as reasonable and in the public interest and in accord with national and departmental policy, which stipulation requires lessees to engage the services of a qualified professional archaeologist to conduct a survey of the areas to be disturbed for evidences

of archaeological or historic sites or materials with the cost to be borne by the lessees, but such archaeologist is not required to work only under the authority of a current Antiquities Act permit.

2. Patents of Public Lands: Effect -- Statutes

The Bureau of Land Management has the authority to impose a stipulation an an oil and gas lease covering reserved minerals on patented lands, which would require archaeological investigation and excavations by lessee.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This is a consolidated appeal by General Crude Oil Company from five separate decisions of the Colorado State Office, Bureau of Land Management (BLM), involving the 27 oil and gas lease offers listed in Appendix A, attached hereto.

In the decisions below the Bureau of Land Management (BLM) required the execution of special stipulations as a condition precedent to the issuance of leases. 1/ The stipulations are set forth on Form CSO 3100-7 (November 1974) and consist of the standard Surface Disturbance Stipulations, which are in accord with BLM Form 3109-5 (May 1973), and contain an added section entitled "5. Protection of Cultural Resources." Appellant has indicated that it has no objection to the Surface Disturbance Stipulations but it appeals from the requirement that it execute that portion of the stipulation which is entitled "Protection of Cultural Resources." This reads:

> 5. Protection of Cultural Resources
>
> A. Prior to undertaking any ground disturbing activities on lands covered under the provisions of this lease, the lessee shall:
>
> 1. Engage the services of a qualified professional archeologist to conduct a thorough and complete survey of areas to be disturbed for evidences of archeological or historic sites or materials. Said archeologist shall work only under the authority of a current Antiquities Act permit, applicable to the area to be investigated.
>
> 2. Provide the lessor sufficient time to review documentary evidence that a survey as required by (1) above, has been performed. This evidence shall be in the form of a report from the archeologist and shall cover, at a minimum:

1/ Two of the offers – C-21484 and C-21504 – were partially rejected as to certain described lands because the United States owns no interest in the minerals therein. See Appendix A. As these were not mentioned in the statement of reasons for appeal, the partial rejections have become final.

citation of permit authority, location of area(s) surveyed, methods employed, report of findings, conclusions/recommendations.

3. Follow the requirements set forth by the lessor concerning protection, preservation, or disposition of any sites or material discovered. In cases where salvage excavation is necessary, the cost of such excavations shall be borne by the lessee.

B. After undertaking ground disturbing activities, the lessee shall insure compliance with those portions of Section 2(q) of the basic lease terms that require reporting and protection of materials of scientific or historic interests encountered during performance of the lease. [2/]

In its statement of reasons appellant states it objects to the portion of the stipulation dealing with the protection of cultural resources on the ground that this part of the stipulation goes beyond anything required by the statutes or regulations and requires the lessee not only to protect the cultural resources but also to locate them. Appellant further asserts that this portion of the stipulation is not supported by any showing that cultural resources are located on the land or that if they are located on the lands they are of sufficient value to warrant the imposition of the stipulation. Appellant contends compliance with the stipulation would

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2/ In transmitting the appeals to this Board, BLM stated:

"On November 15, 1974, new Archeological stipulations were added to the standard Surface Disturbance Stipulations (Form CSO 3100-7). A notice was posted in the Public Room of the Colorado State Office that on all offers filed after December 1, 1974, the new stipulations would automatically become a part of the lease. However, on offers filed prior to December 1, 1974, the stipulations are sent to the offeror for execution and return."

require considerable time and expense on the part of the oil and gas lessee, which may have no relationship to the probability of the location of a site on the lease lands, including the requirement that lessee must engage the services of a qualified professional archeologist; also, that the institution with which the archeologist is associated must then obtain an Antiquities Act permit from Washington, D.C., to carry out a thorough and complete survey of the areas to be disturbed; and, finally that the stipulation is unreasonable as lessee could not comply with it relative to patented land and it is not required for protection of such patented lands. The appellant in essence raises two questions: (1) whether the stipulation is a valid and reasonable requirement, and (2) if valid and reasonable, is it properly applicable to patented lands.

Each case file herein contains a copy of an Environmental Report Face Sheet which indicates that no "102 statement" is required under the National Environmental Policy Act. 3/ Appellant states that the Face Sheet

> * * * also reflects that an umbrella Environmental Analysis Report No. 050-74-16 dated November 13, 1973, was prepared by the Canon City District Office of the Bureau of Land Management which covers the environmental effect of oil and gas operations in the San Luis Valley Area. This report at page 13 contains a statement that

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3/ This refers to environmental impact statements required by sec. 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970).

> the valley floor has numerous historical sites and the foothills and mountains have historical and archeological sites and maps showing historical and archeological sites and trails are on file in the Canon City District Office; however, there is no indication on the Environmental Report Face Sheet that such sites are located on the lands covered by the subject oil and gas lease applications.

[1] This Board has upheld as reasonable a stipulation providing for a survey of historical and archeological sites to be performed by an oil and gas lessee at his own cost prior to entry upon the leased lands for purposes of exploration or drilling, where the survey is restricted to those areas which lessee proposes to enter, the protection of such sites is authorized by statute, and the stipulation does not substantially abridge the lessee's rights under the lease. W. E. Haley, 25 IBLA 311 (1976).

It is stated in this case that:

> Section 2 of the Antiquities Act of June 8, 1906, 16 U.S.C. § 431 (1970), authorizes the creation of national monuments centered around "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States."
>
> It is further provided in $1 of the Historic Sites Act of August 21, 1955, 16 U.S.C. § 461 (1970), that there is a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." The Secretary of the Interior is authorized under the Act to make a survey of historic sites, buildings, and objects and to restore and preserve them. 16 U.S.C. § 462 (1970). The Secretary may seek the assistance of other federal departments in administering the Act. 16 U.S.C. § 464 (1970).
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> * * * * * * *

> The fact that the lessee may have to bear the cost of the inventory does not make the stipulation objectionable. This Board has previously held that the financial burden of complying with protective stipulations in oil and gas leases is the sole responsibility of the lessee. Bill J. Maddox, 24 IBLA 147, 150 (1976).
>
> The statutes referred to above establish the authority for the protection of archeological and historical sites and objects in the public interest. The stipulation in this case appears both necessary and appropriate to avoid inadvertent destruction of such sites or objects. For these reasons, we find that the stipulation involved here is a reasonable one which should be upheld in the public interest.

Similarly, this Board in Cecil A. Walker, 26 IBLA 71 (1976), 4/ upheld a stipulation in an oil and gas lease whereby, at the cost of the lessee, he had to engage a qualified archeologist to survey and salvage in advance of any operations archeological values on the lands involved. The stipulation set forth at 26 IBLA 72-73 read:

> To secure specific compliance with the stipulations under Sec. 2, paragraph (q) of the oil and gas lease form, the lessee shall, prior to operations, furnish to the Authorized Officer a certified statement that either no archaeological values exist or that they may exist on the leased lands to the best of the lessee's knowledge and belief and that they might be impaired by oil and gas operations. Such certified statement must be completed by a qualified archaeologist acceptable to the Authorized Officer.
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> If the lessee furnishes a statement that archaeological values may exist where the land is to be disturbed or occupied, the lessee will engage

4/ See also C. C. Hughes, 27 IBLA 38 (1976), which follows the Haley and Walker cases.

> a qualified archaeologist, acceptable to the Authorized Officer, to survey and salvage, in advance of any operations, such archaeological values on the lands involved. The responsibility for the cost for the certificate, survey and salvage will be borne by the lessee, and such salvaged property shall remain the property of the lessor or the surface owner.

This stipulation was to be used in every oil and gas lease issued in the Elko District in Nevada. The stipulation was to supplement clause 2(q) of the standard oil and gas lease form, which provides in part as follows: [quoted in full below.]

> When American antiquities or other objects of historic or scientific interest including but not limited to historic or prehistoric ruins, fossils or artifacts are discovered in the performances of this lease, the item(s) or conditions(s) will be left intact and immediately brought to the attention of the contracting officer or his authorized representative.

The Walker case, supra, at pages 74-76 states:

> * * * it is well established that the Secretary of the Interior may require an applicant for an oil and gas lease to accept stipulations reasonably designed to protect environmental and other land values as a condition precedent to the issuance of a lease. W. E. Haley, 25 IBLA 311 (1976); Earl R. Wilson, 21 IBLA 392 (1975); Richard P. Cullen, 18 IBLA 414 (1975); W. T. Stalls, 18 IBLA 34 (1974); Duncan Miller, 16 IBLA 349 (1974); 43 CFR 3109.2-1. The need for the stipulation should be clear and the stipulation should be a reasonable means to the intended purpose. Earl R. Wilson, supra.

Several statutes establish the authority for the Department's involvement in the protection of archaeological values. 2/ We find one statute especially pertinent to the issues raised in the instant case.

The Act of June 27, 1960, 74 Stat. 220, provided for "the preservation of historical and archeological data which might otherwise be lost as a result of the construction of a dam." In 1974, the scope of the Act was broadened to cover "any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program." Act of May 24, 1974, 88 Stat. 174, 16 U.S.C. § 469 (Supp. IV, 1974). The 1974 amendments direct any federal agency to notify the Secretary of the Interior whenever it becomes aware that its activities "in connection with any Federal construction project or any federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data." 16 U.S.C. § 469a-1(a) (Supp. IV, 1974).

16 U.S.C. § 469a-2(a) (Supp. IV, 1974) describes the Secretary's responsibilities when notified of a possible loss or destruction of archaeological data:

> The Secretary, upon notification, in writing by any Federal or State agency or appropriate historical or archeological authority that scientific, prehistorical, historical, or archeological data is being or may be irrevocably lost or destroyed by any Federal or federally assisted or licensed project, activity, or program, shall, if he determines that such data is significant and is being or may be irrevocably lost or destroyed and after reasonable notice to the agency responsible for funding or licensing such project, activity, or program, conduct or cause to be conducted a survey and other investigation of the areas which are or may be affected and recover and preserve such data (including analysis and publication) which, in his opinion, are not being, but should be, recovered and preserved in the public interest.

The broad language of the statute is sufficient to indicate a Congressional desire to preserve archaeological values from surface disturbing activities conducted under

federal oil and gas leases. 3/ The pivotal issue is whether it is reasonable to require a qualified archaeologist to inspect a site prior to surface disturbing activities despite the fact that any archaeological values that may exist on the site have yet to be discovered. We find that the legislative history of the 1974 amendment to that statute indicates a Congressional intent to protect values which have yet to be discovered as well as values which are already known. [See the Walker case, supra, at pages 75 and 76 for a detailed discussion of the legislative history.]

2/ See. e.g., the Antiquities Act of June 8, 1906, 16 U.S.C. §§ 431, 432 (1970); The Historic Sites Act, as amended, 16 U.S.C. §§ 461-467 (1970); and Pub. L. 86-523, as amended, 16 U.S.C. §§ 469-469c (Supp. IV, 1974).

3/ The House Report contained the following statement concerning the broadened scope of the amendments:

"Public Law 86-523, as an extension of the Historic Sites Act of 1935, declared that where the construction of Federal or Federally licensed dams, reservoirs and related activities might result in the loss of historical or archeological data, it should be the policy to preserve and recover such information. As recommended, this legislation broadens that policy to include any Federal or federally assisted construction projects involving the alteration of the terrain, as well as other Federally licensed projects, or Federal activities or programs which might disrupt such values. House Report No. 93-992, 1974 U.S. Code Cong. & Ad. News, p. 3172.

The Walker case, supra, at pages 76-77 further holds:

* * * To the extent that any prior decisions may be interpreted as requiring a showing of known archaeological values before a special stipulation will be approved, e.g., Earl L. Wilson, supra, those decisions are hereby modified. See also Bill J. Maddox, 22 IBLA 97 (1975).

In Walker the Board distinguished the Earl R. Wilson case, where the stipulation requiring an archeological inventory was

held unreasonable. The Board said in Wilson it was not clear when the surface management agency could conduct the survey, and because the stipulation would have prohibited entry until a survey was conducted, the Board conceived the possibility that a lessee might never be authorized to enter the lease. That is not the case where the stipulations have been upheld, for example, in Haley, supra; Walker, supra. That also is not true of the instant case, General Crude. It was found in the Walker case, as in Haley, that the oil and gas lessee must bear the expense of compliance with a reasonable archeological stipulation.

The stipulation in the instant case appears to be on all fours with the Haley and Walker cases with one exception. In the instant case, unlike the other two, the archaeologist must "work only under the authority of a current Antiquities Act permit, applicable to the area to be investigated." We do not find in the other cases that the Board required an Antiquities Act permit. Haley, supra; Walker, supra. Moreover, we find no such requirement in the standard oil and gas lease form (section 2(q)), in the standard geothermal lease, or in the standard coal lease form, quoted in full below in footnotes 4, 5, and 6. We find no situation in which the requirement that the archaeologist work under an Antiquities Act permit is required and that such requirement has been officially approved by the Department of the Interior. On the face of it, such a requirement seems burdensome to the lessee and not

necessary for the protection of archaeological values by the Department. Accordingly, we find the stipulation in the instant case reasonable with the exception of the requirement for the permit. We therefore affirm the requirement by BLM for the stipulation herein with (1) the deletion from the first paragraph the last three lines "Said archaeologist shall work only under the authority of a current Antiquities Act permit, applicable to the area to be investigated"; and (2) the deletion from paragraph 2, line 6, the words "citation of permit authority."

[2] The second issue herein is whether the stipulation is properly applicable to patented land in which the United States has reserved the minerals.

It is clearly the policy of Congress, and, therefore, of the United States, to protect antiquities and archaeological values, as is seen from the following. Thus, the American Antiquities Act of 1906, 16 U.S.C. § 431 et seq. (1970), provides that any person who shall injure or destroy any historic or prehistoric ruin or object of antiquity shall upon conviction be fined the sum of not more than $500 or be imprisoned for a period of not more than 90 days and provides for the granting of permits to qualified institutions to examine ruins, excavate archaelogical sites and gather the objects of antiquities on lands owned or controlled by the United States. Also the Historic Sites Act of 1935, 16 U.S.C. § 461 et seq. (1970), declares that it shall be a national policy to preserve for use

historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. Section 462 provides that the Secretary of the Interior, through the National Park Service, shall have the duty to make a survey of historic and archaeological sites, make investigations and researches relating to particular sites, buildings or objects, to obtain true and accurate historical and archaeological facts and information concerning the same, to restore, reconstruct, rehabilitate, preserve and maintain historic and prehistoric sites, buildings, objects and properties of national historic or archaeological significance, and adopt rules and regulations necessary to carry out the provisions of the Act.

The Act for the Protection and Enhancement of the Cultural Environment of 1966, 16 U.S.C. § 470 (1970), contains the declaration by Congress that the historical and cultural foundations of the nation should be preserved as a living part of community life and development in order to give a sense of orientation to the American people, and authorizes the Secretary of the Interior to expand and maintain a national register of districts, sites, buildings, structures and objects of significance in American history, architecture, archaeology and culture, to be called the "National Register." The Act provides for establishment of an Advisory Counsel on Historic Preservation, whose regulations are contained in 36 CFR 800, 39 FR 6104, February 19, 1974, and a primary concern with properties which may be suitable for inclusion in the

National Register of Historic Places. The National Environmental Protection Act, 1969, 42 U.S.C. 4331(b)(4) (1970), provides that it is the responsibility of the Federal Government to preserve important historic, cultural and natural aspects of our national heritage.

Executive Order No. 11593 of May 31, 1971, was issued in furtherance of the purposes of the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, the Historic Sites Act of 1935 and the Antiquities Act of 1906. It provides that the Federal government shall provide leadership in preserving, restoring and maintaining the historical and cultural environment of the nation, and that by July 1, 1973, federal agencies shall locate, inventory and nominate to the Secretary of the Interior all sites, buildings, districts and objects under their jurisdiction or control appear justified for listing in the National Register of Historic Places. The Archaeological and Historical Data Conservation Act of 1974, 88 Stat. 174, 16 U.S.C.A. § 469 (1974), amended the Reservoir Salvage Act of 1960, 74 Stat. 220, to provide for preservation of historical or archaeological data and relics which might be destroyed in reservoir construction and flooding by dams constructed under federal license or permit.

The above laws and regulations establish beyond doubt that it is the policy of the United States to protect archaeological values.

As to the position of the Department on the preservation of archaeological values, the standard lease form for oil and gas, 5/ coal, 6/ and geothermal steam 7/ (see following page for fn. 7/) specifically require the protection and preservation of archaeological values. The Haley and Walker cases discussed above

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5/ Oil and gas standard lease form provides in part:

"Section 2(q) Protection of surface, natural resources, and improvements. - To take such reasonable steps as may be needed to prevent operations on the leased lands from unnecessarily: (1) causing or contributing to soil erosion or damaging crops, including forage, and timber growth thereon or on Federal or non-Federal lands in the vicinity; (2) polluting air and water; (3) damaging improvements owned by the United States or other parties; or (4) destroying, damaging or removing fossils, historic or prehistoric ruins, or artifacts and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required and to the extent deemed necessary by the lessor to fill any pits, ditches or other excavations, remove or cover all debris, and so far as reasonably possible, restore the surface of the leased land and access roads to their former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to the leased lands and improvements thereon whether or not owned by the United States. When American antiquities or other objects of historic or scientific interest including but not limited to historic or prehistoric ruins, fossils or artifacts are discovered in the performance of this lease, the item(s) or condition(s) will be left intact and immediately brought to the attention of the contracting officer or his authorized representative. [Emphasis supplied.]

6/ Section 15 of the standard coal lease form reads:

"SECTION 15. Antiquities and Objects of Historic and Scientific Value.

(A) 'Cultural resources' for the purpose of this section shall be defined as any district, site, building, structure, or object of American historical, scientific prehistoric, archaeological, or architectural significance. Prior to the submission of any exploration or mining plan, the Lessee shall engage a qualified independent expert who shall conduct a survey, acceptable to the District Manager, of the lands to be disturbed under that plan and immediately adjoining lands to determine the existence of cultural resources. (Information collected prior to the Effective Date as to cultural resources on the Leased Lands shall, with the approval of the District Manager, satisfy

also show the Departmental policy is to protect and preserve archaeological values.

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fn. 6 (continued)
all or part of the Survey requirements of this section.) The expert conducting the survey shall be a person acceptable to the District Manager and the terms and conditions of the contract under which the survey is conducted shall be subject to approval of the District Manager. The contract shall provide that the expert shall be directly responsible to the Lessor, and the Lessor shall, upon approval of the contract, become a party thereto. The District Manager shall approve (or disapprove as the case may be) the contract not later than 30 days after the Lessee submits the contract to him. The survey, at the discretion of the Lessee, may be in two parts, one covering the lands which are the subject of the exploration plan and one covering the lands which are the subject of the mining plan, or may be in one part including the lands which are the subject of both the exploration plan and the mining plan. The responsibility and cost of the survey and of any salvage that may be required as a result of such survey will be that of the Lessee. No plan in connection with which a survey is prepared shall be approved before the expert has completed a survey acceptable to the District Manager. In order that the requirements of this section may be expeditiously fulfilled, the Lessee may elect to have the expert on hand during exploration or mining to complete the necessary survey of additional lands not covered by the initial survey before those lands are disturbed pursuant to changes which the Mining Supervisor approves in the exploration or mining plan. In the event that the survey identifies cultural resources, the plan shall contain provisions to avoid the disturbance of such discoveries until the Lessee and the Lessor have complied with the law with respect to such discoveries.

"(B) The Lessee shall immediately bring to the attention of the Mining Supervisor any cultural resources discovered as a result of operations under this Lease and shall lease such discoveries intact. The Mining Supervisor shall immediately inform the District Manager of the discovery and the District Manager shall, within ten days thereafter, evaluate the discoveries brought to his attention to determine whether such discoveries may be potentially qualified for inclusion in the National Register of Historic Place or may be otherwise significant as a cultural resource. If the District Manager shall make such determination in the affirmative, he shall immediately refer this determination to the appropriate officer of the Department of the Interior for review and approval of potential qualification, which shall be made within 10 days thereafter. During this period for determination and evaluation of the discovery, the Lessee shall comply with the directions of the District Manager so as to avoid the disturbance of the cultural resource."

7/ Section 14 and 18 of the standard geothermal lease form read:

"Sec. 14. PROTECTION OF THE ENVIRONMENT (LAND, AIR AND WATER) AND

When the Government retains the mineral rights in land, although it does not own the surface, the Government has the

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fn. 7 (continued)
IMPROVEMENTS - The Lessee shall take all mitigating actions required by the Lessor to prevent: (a) soil erosion or damage to crops or other vegetative cover on Federal or non-Federal lands in the vicinity; (b) the pollution of land, air or water; (c) land subsidence, seismic activity, or noise emissions; (d) damage to aesthetic and recreational values; (e) damage to fish or wildlife or their habitats; (f) damage to or removal of improvements owned by the United States or other parties; or (g) damage to or destruction or loss of fossils, historic or prehistoric ruins, or artifacts. Prior to the termination of bond liability or at any other time when required and to the extent deemed necessary by the Lessor, the Lessee shall reclaim all surface disturbances as required, remove or cover all debris or solid waste, and, so far as possible, repair the offsite and onsite damage caused by his activity or activities incidental thereto, and return access roads or trails and the leased lands to an acceptable condition including the removal of structures, if required. The Supervisor or the Authorized Officer shall prescribe the steps to be taken by Lessee to protect the surface and the environment and for the restoration of the leased lands and other lands affected by operations on the leased lands and improvements thereon, whether or not the improvements are owned by the United States. Timber or mineral materials may be obtained only on terms
and conditions imposed by the Authorized Officer.

"Sec. 18. ANTIQUITIES AND OBJECTS OF HISTORIC VALUE - The Lessee shall immediately bring to the attention of the Authorized Officer any antiquities or other objects of historic or scientific interest, including but not limited to historic or prehistoric ruins, fossils, or artifacts discovered as a result of operations under this lease, and shall leave such discoveries intact. Failure to comply with any of the terms and conditions imposed by the Authorized Officer with regard to the preservation of antiquities may constitute a violation of the Antiquities Act (16 U.S.C. 431-433). Prior to operations, the Lessee shall furnish to the Authorized Officer a certified statement that either no archaeological values exist or that they may exist on the leased lands to the best of the of the [sic] Lessee's knowledge and belief and that they might be impaired by geothermal operations. If the Lessee furnishes a statement that archaeological values may exist where the land is to be disturbed or occupied, the Lessee will engage a qualified archaeologist, acceptable to the Authorized Officer, to survey and salvage, in advance of any operations, such archaeological values on the lands involved. The responsibility for the cost for the certificate, survey, and salvage will be borne by the Lessee, and such salvaged property shall remain the property of the Lessor or the surface owner."

authority to go on the land to the extent necessary to extract the minerals. As a corollary to this authority, the Government has the duty not to destroy any object or property not necessary to the extraction of the mineral. For the Government to satisfy its duty not to damage the surface unnecessarily, it must be able to ask an expert to appraise conditions and advise it accordingly. The Government in leasing the lands to another, may pass on to the lessee its authority to remove the minerals and its duty not to damage the surface and objects on the surface, and the duty to engage the services of an expert to advise it how not to damage the surface.

From the above discussion of statutes, departmental cases, and departmental lease forms for geothermal steam, oil and gas, and coal, it is clear there is a national and a departmental policy to protect archaeological values.

Further, it is noted that section 2(q) of the standard oil and gas lease form requires the restoration of the leased land to its former condition, whether or not the land is owned by the United States. In The Montana Power Company, 72 I.D. 518 (1965), the Secretary of the Department upheld the requirement in a coal lease to the effect that the lessee had to restore the surface

of the leased land to its former condition even though the land in question was not owned by the United States.

The only logical conclusion from the foregoing is that the Government, which has a mineral right in patented land, has the authority to go on that land to retrieve the mineral; to retrieve the mineral in such a way that it does not unnecessarily damage the surface, including articles of value on the surface; that it can sell the mineral to another; and that it can give these concomitant rights with the mineral to another – to retrieve the mineral and to do so in such a way that it does not damage the surface unnecessarily. Accordingly, for these reasons and in view of the national and departmental policy to protect archaeological values, we find that the stipulation herein, with the special Antiquities Act permit requirement deleted, is properly applicable to patented land.

The request for an oral argument is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is herein affirmed as modified

above, and the case is remanded for the amended stipulation to be presented to the lessee for his agreement.

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Anne Poindexter Lewis
Administrative Judge

We concur:

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Newton Frishberg
Chief Administrative Judge

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Martin Ritvo
Administrative Judge

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Joan B. Thompson
Administrative Judge

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Joseph W. Goss
Administrative Judge

APPENDIX A

IBLA Docket No.	Lease Offer No.	Date of BLM Decision
75-264	* C-21484	November 20, 1974
75-264	C-21485	November 20, 1974
	C-21493	"
	C-21516	"
	C-21517	"
75-293	C-21482	December 20, 1974
75-304	C-20927	December 30, 1974
	C-20928	"
	C-20929	"
	C-20930	"
	C-21466	"
	C-21468	
	C-21469	
	C-21472	
	C-21495	
	C-21496	
	C-21497	
	C-21498	
	C-21499	
	C-21500	
	C-21501	
	C-21502	
	C-21513	
	C-21514	
	C-21518	
	C-21519	
75-304	* C-21504	December 30, 1974

* Offers C-21484 and C-21504 were each rejected in part as to certain lands in which the United States owns no interest in the minerals therein.

ADMINISTRATIVE JUDGE STUEBING DISSENTING IN PART:

I am seriously concerned by what I perceive to be the fundamental error of the majority in affirming the application of the subject stipulation to leases of reserved minerals on patented lands. My opposition to this use of the stipulation does not ignore its high-minded intent, and I readily acknowledge that it is the declared policy of the United States and of this Department to protect archaeological values. Moreover, I recognize that the stipulation at issue has been devised in an effort to implement that policy.

Any endeavor to preserve valuable links with the past may boast a laudable purpose. But the means of achieving that purpose must be legal, reasonable and susceptible of accomplishment.

Where lands have been patented with a reservation of minerals to the United States, it is the landowner who owns the bones, fossils, artifacts and items of historic or anthropological interest, 1/ as

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1/ It is basic to both English and American jurisprudence that such property belongs to the owner of the locus in quo. See, e.g., Allred v. Biegel, 219 SW2d 665 (Mo. 1949), determining ownership of an ancient Indian canoe.

well as the sites of any historic event, or any alteration or improvement of the land which would form a part of the real estate.

Although the United States has reserved "all the minerals in said lands and the right to prospect for and remove the same," 2/ the United States has no right to enter upon the land for any purpose not directly referable to mineral exploration and production. It has recently been held that patents granted under the Stockraising Homestead Act with a reservation of the minerals to the United States did not establish two separate estates, the surface estate passing to the patentee and the subsurface or mineral estate being reserved to the United States; rather what passed by such patent was fee title, not just the surface estate with a reservation of the subsurface. United States v. Union Oil of California, 369 F. Supp. 1289 (D. Calif. 1973). 3/ Therefore, the United States may not invest its mineral lessee with the authority to engage in nonmineral pursuits on private land under the aegis of an oil and gas lease.

Archaeological investigations, excavations and salvage are as unrelated to mineral production as are investigations of the flora and fauna, or the scenic and recreational values which exist on

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2/ Stockraising Homestead Act of Dec. 29, 1916; 43 U.S.C. § 291 (1970).
3/ Appeal pending.

private land and which may be imperiled by a program of mineral development. Just as the landowner might bar the entry of botanists, wildlife biologists and recreation specialists, he may bar archaeologists from his land.

In compelling the oil and gas lessee to accept this stipulation as a condition to receiving its lease and thereafter to comply with its provisions as a prerequisite to its mineral operations on the leasehold, the government is requiring the lessee to agree to do something that is beyond the legal authority of either the government or the lessee. Neither party to the lease has the power to force the landowner to allow archaeologists to enter upon the land for the purpose of conducting archaeological survey and salvage operations, because both the land and the relics, if any, are the private property of the landowner.

To keep a proper perspective, we must bear in mind that the owner of the land which is subject to a federal reservation of all minerals will generally not favor the prospect of his land being entered and developed. The landowner will not share in any of the rents or royalties deriving from the mineral lease, but he will frequently feel threatened or discommoded by the anticipated arrival of seismic crews, road builders, drilling crews, and the installation of drilling rigs, pumping stations, tank batteries, sump pits,

etc. He will not be compensated for noise, dust, odors, the departure of game, or the altered behavior of his cows, chickens or the family dog. He will be very likely to regard the proposed operation of the lessee as a most unwelcome intrusion which he would enthusiastically prevent if he had the means.

Accommodatingly, the majority has provided the owner with the means to exclude all surface occupancy of his lands. All he need do is say "No" when requested to admit the archeologists. Thus the will of the Congress in carefully reserving valuable mineral deposits to the use and benefit of the American people can be frustrated by concern for the preservation of some privately owned archaeological values which are most probably nonexistent in any given instance.

It is not my thesis that the imposition of the stipulation is illegal. Many kinds of contracts are made contingent upon the occurrence of some event or subject to the approval of some third person over which the contracting parties have no control. Theater owner A might contract to rent his hall to impresario B, subject to the approval of concert master C. Or X might contract to sell his house to Y, contingent upon Y's securing a loan commitment for a given sum on certain specified terms.

The difference between the foregoing examples and what is contemplated here is that contracts of the type exemplified above

generally make provision for the nonoccurrence of the contingency which is under third-party control. Usually in such cases the contract will be rescinded or voided by its own terms. But in the case at bar the lessee's only option is to relinquish the lease and accept his loss. Presumably, the United States will again issue the lease to another lessee, impose the same stipulation, and the same landowner will again say the same thing to the new lessee, who will then be obliged to absorb his loss, and so on.

Of course there are other options open to the lessee. He could undertake to deceive the landowner as to the archaeologist's identity and purpose, perhaps passing him off as a member of the survey crew. Or the lessee could attempt to pay off the landowner in an amount sufficient to purchase his acquiescence. Or the lessee could burden the landowner with litigation or the threat of litigation in an effort to coerce his agreement. However, in my view the Government should not be in the position of having created the climate for these kinds of recourse.

Also, there are significant questions which arise from the complex common law of contracts relating to recovery where performance is impossible, and the extent to which the rights of the parties may be altered where one party assumes the risk of impossibility. See Williston and Thompson, Selections from Williston on Contracts (Rev. Ed.) §§ 1972-74; Restatement of Contracts §§ 456, 457, 468. However, I will not address these questions here.

The majority cites The Montana Power Company, 72 I.D. 518 (1965). In that case the Department had imposed a requirement for surface restoration in a coal lease of privately owned lands containing coal deposits which were federally owned. The lessee, Montana Power Company, argued that the lands were of low value, suitable only for grazing, and the cost of restoration would exceed the value of the land. Moreover, the owner of the land, Northern Pacific Railway, was apparently unconcerned and waived its right to have the land restored. Nevertheless, Secretary Udall ruled that the lease requirement must be complied with. However, it is my opinion that if Northern Pacific Railway had actively opposed the restoration instead of merely indicating indifference, the United States could not have compelled the owner to accept the Government's concept of restoration. To illustrate this, let us assume that a coal company held a federal coal lease on a tract of typical prairie land in Nebraska. After completion of its operation the spoil bank formed a low, stable hill with a road to the crest, and the open pit filled with water to form a small lake. The landowner perceives that with a little work the hill would make an attractive homesite, and he is delighted with the altered condition of his land. Could the United States force its lessee to "restore" the land by using the spoil to fill the pit, destroying the hill and the lake over the vehement objections of the landowner? I believe the owner would encounter no difficulty in securing a permanent injunction

against any such exercise of dominion over his land. Accordingly, I regard the majority's reliance on Montana Power Company, as misplaced.

For the same reason I do not believe that section 2(q) of the standard oil and gas lease form (or any similar provision in any other lease form) is efficacious to the extent that it provides:

> * * * The lessor may prescribe the steps to be taken and restoration to be made with respect to the leased lands and improvements thereon whether or not owned by the United States. * * *

Also, the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 430 (1970), offers no authority for such an intrusion. The act is limited by its own terms to matters of historic or scientific interest that are situated upon "lands owned or controlled by the Government of the United States." It has long been the position of this Department that permits under the Act may not be issued for excavations and investigations on patented lands. Solicitor's Opinion, Archaeological Ruins, 52 L.D. 269, 272 (1928).

Neither is there any warrant to authorize the entry of private lands for this purpose in the language of the National Environmental Policy Act of 1969, the Historic Sites Act of 1935, or the National Historic Preservation Act of 1966. In fact, a provision at 16 U.S.C

§ 469a-1 (1970 Supp. V, 1975), indicates that Congress is fully aware of the limitations of federal authority where private property is concerned. The provision states:

> (b) Whenever any Federal agency provides financial assistance by loan, grant, or otherwise to any private person, association, or public entity, the Secretary, if he determines that significant scientific, prehistorical, historical, or archeological data might be irrevocably lost or destroyed, may with funds appropriated expressly for this purpose conduct, with the consent of all persons, associations, or public entities having a legal interest in the property involved, a survey of the affected site and undertake the recovery, protection, and preservation of such data (including analysis and publication). The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands. [Emphasis added.]

It is clear that neither the Bureau of Land Management nor its oil and gas lessee can compel the landowner to allow archaeological survey or salvage work on his land. All that can be done is to seek his permission. But the lessee should not be obliged to accept the loss of all significant value of his lease if the landowner refuses permission, nor should the people of the United States be denied the use of the mineral which has been reserved in their name in that event.

This Board has held that stipulations may be imposed on oil and gas leases for the protection of other land values, but the stipulations must be such that they do not unreasonably interfere with the

lessee's right of enjoyment. A. Helander, 15 IBLA 107 (1974). I think that to condition the lessee's right of enjoyment of his lease on obtaining the acquiescence of a third party is to unreasonably place the right of enjoyment in jeopardy. We have also held that a lease stipulation "should be a reasonable means to the intended purpose." Cecil A. Walker, 26 IBLA 71, 74 (1976). I do not regard this as such.

Therefore, I would amend the stipulation to require only that the lessee show to the satisfaction of the BLM that a diligent and bona fide effort had been made to secure the landowner's written consent to the archeological work. Upon a showing by the lessee that such an effort had been made without success, the entire requirement would be waived.

_____
Edward W. Stuebing
Administrative Judge

We concur:

_____
Douglas E. Henriques
Administrative Judge

_____
Frederick Fishman
Administrative Judge